



**Mahony Horner Lawyers**

# Trusts Act 2019

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# Trusts Act 2019

Came into force on 30 January 2021:

- Makes trust law more accessible;
- Applies to all express trusts;
- Sets out mandatory and default duties;
- Improves beneficiary rights;
- Gives flexible powers and updates rules;
- Promotes the efficient resolution of trust-related disputes; and
- Provides more options to remove and appoint trustees.

# Key changes

- The maximum duration of a trust is extended from 80 years to 125 years;
- There is now a limit on trustee exemption and indemnity clauses.
- The ability to delegate duties and powers;
- Trustees have a duty to keep copies of the trust deed and any variations and at least one trustee will need a full set of 'core' trust documents;
- The age of majority is now 18;
- Trustees can now use alternative dispute resolution procedures even if not specifically recorded in the trust documents; and
- There is a simplified process for replacing mentally incapable trustees.

# Trustee Duties

The mandatory trustee duties are as follows:

- The duty to know the terms of the Trust;
- The duty to act in accordance with the terms of the Trust;
- The duty to act honestly and in good faith;
- The duty to hold or deal with Trust property and otherwise act for the benefit of the beneficiaries or for the permitted purpose; and
- The duty to exercise the power of the trustee for a proper purpose.

# Trustee Duties

The default trustee duties are as follows:

- The general duty of care;
- The duty to invest prudently;
- The duty not to exercise any power directly or indirectly for the trustee's own benefit;
- The duty to actively and regularly consider the exercise of the trustee's powers;
- The duty not to bind or commit trustees to future exercise of discretion;
- The duty to avoid conflict of interest;
- The duty of impartiality;
- The duty not to make a profit from the trusteeship of a Trust;
- The duty to act for no reward; and
- The duty to act unanimously.

# Trustees' obligations to give information to beneficiaries

- Presumption that 'basic trust information' must be made available to beneficiaries and 'trust information' be available to beneficiaries who request it.
- Basic trust information includes information that a person is a beneficiary of the trust, the name and contact details of the trustees, details of trustee changes as they occur and the beneficiary's right to request further trust information.
- Additional trust information is:
  - the trust deed;
  - any variations to the trust deed;
  - records of trust property (identifying the assets, liabilities, income and expenditure)

# Trustees' obligations to give information to beneficiaries

- records of trustee decisions;
- written contracts entered into;
- accounting records and financial statements;
- change of trustee documents; and
- any other relevant trust documents.

# Factors to consider

- The nature and interests of the beneficiary (including whether the beneficiary is likely to receive trust property in the future);
- The nature and interests of other beneficiaries;
- Whether the information is subject to personal or commercial confidentiality;
- The intentions of the settlor when the trust was established;
- The age and circumstances of the beneficiary in question and the other beneficiaries of the trust;
- The effect of giving the beneficiary the information;
- The effect on the trustees, other beneficiaries of the trust, and third parties of giving the information;

# Factors to consider

- The practicality of giving some or all of the information to the beneficiary in redacted form
- The practicality of imposing restrictions and other safeguards on the use of the information
- The nature and context of any request for further information; and
- Any other factor a trustee reasonably considers is relevant.

# Breach of Trust and Limitation of Liability

- The Act provides the terms of a Trust must not:
- Limit or exclude a trustees liability for any breach of trust arising from dishonesty, wilful misconduct or gross negligence; or
- Provide a trustee any indemnity against the Trust property in respect of liability for breach of trust arising from the trustee's dishonesty, wilful misconduct or gross negligence.

# Retention of Core Trust Documents

Each Trustee must keep:

- The Trust Deed;
- Any variations made to the Trust Deed;

One trustee must keep:

- Records of the Trust property that identify the assets, liabilities, income and expenses of the Trust;
- Any records of Trust decisions;
- Any written contracts;
- Any accounting records and financial statements;
- Documents of appointment removal and discharge of trustees;
- Administration documents;
- Any documents referred to above that were kept by a former trustee during that person's trusteeship and passed on to the current trustee.

# Appointment and Discharge of Trustees

- Exercise power honestly and in good faith, and for proper purpose.
- The person nominated in the trust deed can appoint and remove trustees.
- If no one is nominated in the trust deed or the nominated person is unable or unwilling to act, the remaining trustees have the power of appointment and removal.

# Appointment and Discharge of Trustees

**No nominated person or remaining trustee who is able or willing to act, then:**

- power to remove and replace a trustee may be exercised by:
  - a property manager of a trustee;
  - the attorney of a trustee who has lost capacity; or
  - the liquidator of a corporate trustee.
- retiring trustee may appoint a replacement;
- executor or administrator of deceased trustee may appoint a replacement; and
- the High Court may appoint a trustee.

# Alternative Dispute Resolution

The provisions relating to ADR include provisions providing for—

- the power of a trustee to refer an internal or external trust matter to ADR;
- the power of the court to appoint representatives for unascertained or incapacitated beneficiaries;
- the power of a court to require an ADR process; and
- the trustee's liability in relation to an ADR settlement.

# Conclusion

- Trustee obligations are more onerous
- The Act is clear about what is expected of Trustees
- The Act clearly sets out the extent of beneficiaries rights
- Consider the future of the Trust
- Make sure trustees are meeting their obligations as a Trustee



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